
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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IN RE
1998 BIENNIAL REGULATORY REVIEW – REVIEW OF THE
COMMISSION'S BROADCAST OWNERSHIP RULES AND OTHER
RULES ADOPTED PURSUANT TO SECTION 202 OF THE
TELECOMMUNICATIONS ACT OF 1996

MM Docket No. 98-35

REPLY COMMENTS OF THE
NETWORK AFFILIATED STATIONS ALLIANCE

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Review of the Commission's Broadcast) MM Docket No. 98-35
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Pursuant to Section 202 of the)
Telecommunications Act of 1996)

TO: The Commission

**REPLY COMMENTS OF THE
NETWORK AFFILIATED STATIONS ALLIANCE**

I. SUMMARY AND INTRODUCTION

The Network Affiliated Stations Alliance ("NASA"), a coalition of the affiliate associations of the ABC, CBS and NBC Television Networks, strongly implored the Commission in initial comments to leave in place the national television ownership cap and the cable/television cross-ownership rule. The regulatory structure enabled by these rules properly preserves competition in the broadcast industry and permits the local control that is at the heart of our system of free, over-the-air broadcasting. No party seeking repeal of these rules counters this fundamental truth.

In support of repeal, commenting parties focus on irrelevant generalities that have no bearing on the real harms to competition, diversity and localism that would flow from dismemberment of either ownership rule. In the case of the national ownership rule, proponents of repeal ignore the unequivocal language of, and intent behind, the 1996 Act. And any supposed efficiencies that might flow from increased ownership opportunities are far outweighed by the harm to the public interest that would result from expansion or repeal of the 35 percent ownership cap. With respect to the cable/television cross-

ownership rule, proponents of repeal gloss over the competitive concerns inherent in cable's gatekeeper role: a role that gives cable the ability to prevent the public from accessing competing broadcasters. Contrary to the contentions of these parties, the advances in technology and increases in the number of alternative media in the market have not altered the critical need for the cable/television cross-ownership rule.

Significantly, proponents of repeal completely ignore the affects that repeal of either rule would have on the ability of network-affiliated broadcasters to respond effectively to their communities of license. As NASA chronicled in its comments, the broadcaster's ability to respond effectively and comprehensively to its community depends on the terms of the agreements that networks and affiliates are able to negotiate. Both the national ownership cap and the cable/television cross-ownership rule are critically important in equalizing the balance between networks and affiliates at the negotiating table – a balance that is already skewed heavily in favor of the networks. Should the Commission repeal either rule, networks will gain immense economic power. Repealing or relaxing the 35 percent cap would increase network power by allowing networks to own or have a significant interest in stations that cover the most important markets in the United States. Repealing the cable/television cross-ownership rule would increase network power by permitting, as a practical matter, combinations of networks and cable MSOs that operate in markets where networks own television stations. This translates into increased bargaining power, negatively impacting the ability of affiliates to negotiate the terms of affiliation under which they can serve local audiences.

The comments in this docket provide no basis for repealing these two minimally intrusive structural regulations that protect the integrity of the network-affiliate partnership, safeguard the public interest by maintaining competition and diversity in the broadcast marketplace and ensure that the beneficial decentralization of ownership that has

characterized American broadcasting is able to continue. Both ownership rules should be retained.

II. THE ARGUMENTS ADVANCED BY PROPONENTS SEEKING TO REPEAL THE NATIONAL TELEVISION OWNERSHIP CAP ARE MISPLACED.

At the outset, NASA notes that proponents of repeal misstate the proper scope of the Commission's review of the national ownership cap.¹ As the Notice sets forth, in this biennial review, the Commission is directed to review its ownership rules in accordance with its public interest mandate to advance the goals of competition, diversity, and localism.² With respect to the national ownership cap, unlike the other ownership rules administered by the Commission, Congress, *only two years ago*, found that a 35 percent cap is the appropriate level to further the Commission's public interest goals. And Congress mandated that result by statute. In light of Congress' mandate, the Commission should not put the national ownership rule on the same footing as the other administrative rules that are subject to the biennial review process. Rather, the Commission should defer to Congress' carefully crafted conclusion.

A. PROPONENTS OF REPEAL IGNORE CONGRESS' FINDINGS IN THE 1996 ACT THAT GRANTED UNPRECEDENTED ECONOMIC FREEDOM IN THE BROADCAST MARKETPLACE.

Seeking to avoid Congress' determination of the appropriate ownership level in the 1996 Act, several commenting parties spend an inordinate amount of time regurgitating early Commission statements that expansion of the then-existing 12

¹ See Comments of CBS Corporation ("CBS Comments") at iii (claiming that the Commission must subject the national ownership cap to a "searching, zero-based reexamination").

² See Notice of Inquiry, FCC 98-37 ("Notice") at ¶ 4.

television station, 25 percent national audience cap would not cause competitive harm.³ However, these statements were made prior to the 1996 Act, in some instances a decade before the 1996 Act, and, thus, have little or no bearing on how the Commission should act today.

As NASA detailed in its comments, Congress, *only two years ago*, comprehensively debated the appropriate national television ownership level. Significantly, Congress determined that it was in the public interest to eliminate the restriction on the number of stations any group can own, subject only to the protective measure of a 35 percent audience cap. In so doing, Congress explicitly rejected proposals to expand the cap above 35 percent, concluding that such an expansion would cause competitive harm.⁴ Nothing has changed in the intervening two years to warrant disrupting Congress' carefully reasoned and fully debated compromise. Congress meant what it said and said what it meant: the cap should be set at 35 percent.

Proponents of repeal completely lose sight of the unprecedented freedom afforded them in the 1996 Act. Before the 1996 Act, broadcasters could own only 12 television stations apiece.⁵ The 1996 Act eliminated the 12-station limit altogether and replaced this direct and longstanding limitation with a simple 35 percent audience cap. In the two years since the relaxation of the ownership cap, the networks have had substantial opportunities to acquire new stations. As NASA outlined in its comments, networks own

³ See CBS Comments at 4-7; Comments of Fox Television Stations and USA Broadcasting, Inc. ("Fox Comments") at 5-9. It is worth noting that the Commission's most recent proposal, in 1995, sought to expand the audience reach cap to 50 percent, not to repeal the cap. In 1996, Congress rejected a 50 percent cap as contrary to the public interest. As Senator Hollings put it: "[a fifty percent cap] would be embarrassing for anybody to stand on the floor and ask for it . . ." 142 Cong. Rec. S717 (daily ed. Feb. 1, 1996).

⁴ "This policy decision reflects a carefully calibrated balance and I believe *the duly considered view of Congress on these matters should settle the issue for many years to come.*" 141 Cong. Rec. H1170 (daily ed. Feb. 1, 1996) (statement of Rep. Markey) (emphasis added).

⁵ See 47 C.F.R. § 73.3555 (1995); *Amendment of Multiple Ownership Rules*, 100 F.C.C.2d 17 (1984), *recon. granted in part*, 100 F.C.C.2d 78 (1985).

an expanded number of broadcast stations; they are owned by some of the largest corporations in America; and they are vertically integrated with production companies of various sizes. Under the present rule, a single company now can reach more than one-third of the country's population, and several networks and other companies already have taken advantage of this new freedom.⁶

Congress concluded that the 35 percent rule was critical to address real threats to competition, diversity and localism. And Congress found that the benefit of the rule clearly outweighed the costs. Lacking a compelling public interest justification, the Commission should adhere to Congress' decision.

B. THE COMMISSION SHOULD REJECT THE NETWORKS' CONCLUSORY DISMISSALS OF THE ANTICOMPETITIVE RISKS INHERENT IN REPEAL OR RELAXATION OF THE NATIONAL OWNERSHIP CAP.

Proponents of repeal contend that eliminating or expanding the ownership cap would cause no public interest harm. These arguments are misguided on several levels.

First, proponents of repeal – principally, the four major broadcast networks – are flat wrong in claiming that repeal or expansion of the national ownership rule would not adversely affect competition or diversity in any television market.⁷ The same policy rationale on which Congress based the 35 percent cap in 1996 exists even more dramatically today.⁸ Without the national ownership cap, a few economically powerful

⁶ NASA Comments at 11.

⁷ CBS Comments at 8; Comments of National Broadcasting Company, Inc. ("NBC Comments") at 10.

⁸ As Senator Helms aptly recognized, if the cap were expanded above 35 percent, "the networks will kick the dickens out of an affiliate if the affiliates do not toe the line." 141 Cong. Rec. S8242 (daily ed. June, 13, 1995). *See also* 141 Cong. Rec. S8213 (daily ed. June 13, 1995) (statement of Sen. Dorgan: warning that caps above 35 percent could spawn "greater concentration of television ownership in this country, and we will end up with a half a dozen companies controlling virtually all the television stations in America"). *See also* 141 Cong. Rec. S7945 (daily ed. June 8, 1995) (statement of Sen. Kerrey: "[i]t does matter if we have one single individual controlling a significant portion of the local market, controlling our access to information."); *id.* at 7948 (statement of Sen. Dorgan: "I do not think we should say it is fine with

and vertically integrated companies easily could control the entire broadcast industry in the United States. Concentrated ownership would stifle the expression of varied viewpoints and programming. Opportunities for independent minority ownership would dwindle. Local and regional broadcasters no longer would be able to compete in the programming and advertising markets or participate in local and regional syndication decisions.⁹

Second, contrary to the arguments made by the networks, the surge in cable, DBS and Internet use has no relevance to the critical need to protect and foster the nation's system of free, over the air broadcasting.¹⁰ As the Supreme Court recently emphasized, "[d]espite the growth of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'"¹¹ And, as Chairman Kennard recognizes, "[b]roadcast remains the way that most Americans get vital information about their local communities. So, retaining diversity of ownership of *broadcast* outlets is . . . vital to the democratic process."¹²

In addition, unlike free, over-the-air broadcast television, these alternative media have very limited public interest obligations, do not provide local programming at near the level of local broadcasters (and in some cases not at all), require subscription

us if one group or consortium decides to buy more and more television stations and we lift the ownership limit. . . . [T]hat flies exactly in the opposite direction of competition.").

⁹ This is the case because all broadcasters compete in the market for syndicated and other programming. Larger broadcasters can take advantage of economies of scale in their negotiations with studios and other sources of programming. Smaller broadcasters, which may not have the same audience clout as larger broadcasters, may be disadvantaged in this competition.

¹⁰ See Fox Comments at 10-11; NBC Comments at 5-10.

¹¹ *Turner Broadcasting System v. FCC*, 117 S. Ct. 1174, 1186 (1997) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

¹² Statement of Chairman William E. Kennard, *In re 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996* (March 13, 1998) (emphasis added).

payments, and are not charged, as are broadcasters, with serving the needs of local communities. As NASA pointed out in its comments, although these various media outlets may provide a marketplace of ideas on a global scale, this does not serve as a substitute for the need of free, universally available broadcasting to be diverse in and of itself.

Third, notwithstanding arguments made by NBC, concentration levels under antitrust models are not helpful in determining whether repeal would harm competition or viewpoint diversity in the marketplace.¹³ As the Supreme Court recently concluded, "[f]ederal policy . . . has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation."¹⁴

Communications policy exists to ensure diversity on grounds and to standards different from those entrusted to antitrust law. As the Commission recognizes, there has been consolidation in television station ownership over the last few years.¹⁵ Regardless of whether this consolidation rises to certain levels for purposes of the antitrust laws, such consolidation, particularly by vertically integrated programmers like the networks, will increase centralization of control, thereby threatening the public interest by detrimentally affecting localism and diversity.

¹³ NBC Comments at 12 (citing figures from the Herfindahl-Hirschman Index in support of claim that the television industry is not concentrated and will not become concentrated if the Commission eliminates the ownership cap).

¹⁴ *Turner*, 117 S. Ct. at 1888. See also *National Broadcasting Co. v. United States*, 319 U.S. 190, 223-24 ("While many of the network practices raise serious questions under the antitrust laws, . . . [I]t is not [the FCC's] function to apply the antitrust laws as such.").

¹⁵ *Fourth Annual Report* at ¶ 93. In 1996 alone, the number of television station owners dropped 21 percent.

By expanding or repealing the national ownership rule, contrary to the goals of the *Notice*, the Commission would advance the private interest of a small number of mega-corporations at the expense of the public interest.

C. THE ALLEGED "EFFICIENCIES" AND "PUBLIC INTEREST BENEFITS" IDENTIFIED BY PROponents OF REPEAL DO NOT JUSTIFY THE RESULTING HARM TO THE PUBLIC INTEREST

Proponents of repeal claim that they will save money through sharing the costs of doing business and pooling resources. This saved money, according to commenters, will improve the quality of their programming.¹⁶ NASA anticipated this argument in its comments. As NASA indicated in there, networks have an enormous opportunity to invest in other media outside of broadcast that will enable them to realize similar efficiencies without harming the public interest.¹⁷

As described above, the 35 percent ownership cap creates only minimal restraints on the available investments for groups and networks.¹⁸ Networks can, and regularly do, consider leveraging their assets in ventures that do not implicate the core diversity concerns underlying the national ownership cap. There are an infinite number of other ways that networks can save money without harming the public interest.¹⁹

Proponents of repeal also claim that, through consolidation, they will provide additional local programming.²⁰ Again, even assuming that the networks might provide

¹⁶ See CBS Comments at 12; NBC Comments at 5.

¹⁷ As NASA outlined in its comments, the cap provides no restriction at all on the number of radio stations that a group can own; and it imposes no restriction on networks' movement into cable-programming channels, satellite systems or programming channels, wireless cable, the Internet or other new media.

¹⁸ With the present 35 percent cap, the networks can realize the efficiencies of group ownership detailed in their comments. See Fox Comments at 15; NBC Comments at 15, ABC Comments at 6; and CBS Comments at 13.

¹⁹ In addition, even though networks might be more profitable if the cap were repealed, there is absolutely no reason to believe that any economies would be passed on to audiences as the networks postulate. See CBS Comments at 12.

²⁰ Fox Comments at 15-16; ABC Comments at 15.

more local programming if they acquired additional stations, these illusory promises do not outweigh the very real threat to competition, diversity and localism that would result from repeal or expansion of the ownership level.²¹ And the dubious claim that network-owned stations ever would preempt network programming in favor of additional local programming is not borne out by the current programming practices of networks and network-owned stations; this claim is further belied by the concerns of local and national charities and public interest organizations that have opposed relaxation of the national cap so that *affiliates* will still exist to air fundraising and other programming of importance to local communities.

Proponents of repeal fail to demonstrate that repeal would serve the public interest. And, as NASA explained in its comments, repeal of the rule would reduce the healthy and diverse breadth of viewpoints now available in television markets across the country and abandon an industry structure based on localism in favor of a structure where a handful of enormous, vertically integrated programmers can exercise concentrated national power in the television marketplace. This would violate the proffered purpose of the 1996 Act – to increase competition – and the Commission's public interest obligations in this biennial review.

III. THE COMMENTS REVEAL WIDESPREAD SUPPORT FOR RETAINING THE CABLE/TELEVISION CROSS-OWNERSHIP RULE

The majority of parties commenting on the cable/television cross-ownership rule urge the Commission to retain the rule in its present form.²² As ABC emphasizes in its

²¹ Successful localism requires comprehensive local newscasts and local public affairs programming. Localism certainly is not achieved by transforming local broadcast stations into "passive conduits for network transmissions from New York." H. Rep. No. 104-204 at 221 (1995).

²² See Comments filed by the Association of Local Television Stations ("ALTV Comments"), Comments filed by National Association of Broadcasters ("NAB Comments"), ABC Comments, Comments filed by Univision Communications Inc. ("Univision Comments"),

comments, given the present market conditions in which cable continues to dominate, "joint ownership of cable and broadcast properties within a given community continues to present a level of risk that is different in kind and in degree from the business combinations prohibited by [] other regulations."²³

Cable, particularly at the local level, remains the dominant gateway for video services to the home. Eliminating the cable/television ownership rule would further enhance cable's concentration in local markets and would weaken the ability of broadcasters to compete with cable. For these reasons, and the other reasons raised by commenting parties in support of the rule, the cable/television cross-ownership rule should be retained in its entirety.

A. THE DEMISE OF THE ORIGINAL RATIONALE – PROTECTING CABLE – IS IRRELEVANT TO THE CURRENT NEED FOR THE RULE: PROTECTING BROADCASTERS FROM THE AGGRANDIZEMENT OF CABLE MARKET POWER.

Members of the cable industry harp on the anachronistic nature of the rule's initial purpose in an attempt to evade addressing the real public policy reasons for retaining the rule.²⁴ Although the original purpose of the rule – cable's need for protection – may not exist today, there is little question that the local television marketplace needs protection from an untoward aggregation of cable market power.

When enacting the rule in 1970, the Commission sought to promote "diversity of control over local mass communication."²⁵ Certainly this rationale exists today to protect

Comments filed by the United Church of Christ, Office of Communication, Inc. and Black Citizens for a Fair Media ("UCC/BCFM Comments").

²³ ABC Comments at 30.

²⁴ See Comments of the National Cable Television Association ("NCTA Comments") at 3-4 (arguing that the original rationale behind the rule – concerns over the broadcast industry dominating cable – has no basis in reality today).

²⁵ *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; And Inquiry Into the Development of Communications*

broadcasters from domination by an overly concentrated cable industry. The Commission recently recognized that "local markets for the delivery of video programming generally remain highly concentrated and continue to be characterized by some barriers to entry and expansion by potential competitors to incumbent cable systems."²⁶ And, as ABC recognizes, "the cable industry continues to occupy the dominant position in the MVPD marketplace."²⁷ In addition, Congress, on numerous occasions, also has found that cable systems possess market power in local distribution. As NAB points out, Congress noted earlier this decade that "[t]he cable industry has become a dominated nationwide video medium . . . [and] has become highly concentrated . . . a cable system serving a local community with rare exception, enjoys a monopoly . . . [and] television broadcasters like other programmers can be at the mercy of a cable operator's market power."²⁸

Proponents of repeal are wrong in claiming that the rule no longer serves any public interest benefit.²⁹ The unrestrained combination of a local cable system and a broadcast station in the same market would be certain to result in suppression of

Technology and Services To Formulate Regulatory Policy and Rulemaking And/Or Legislative Proposals, Second Report and Order, 23 FCC 2d 816 (1970). The Commission had examined the issue on two previous inquiries before adopting its rule. See First Report & Order, 1 FCC 2d 387 (1965); Notice of Inquiry, 7 FCC 2d 853 (1967). In 1973, the Commission again considered the rule, concluding:

Our adoption of [the cable/television cross-ownership] provisions – designed to foster diversification of control of channels of mass communication – was guided by two principle goals, both of which have long been established as basic legislative policies. One of these goals is increased competition in the economic marketplace; the other is increased competition in the marketplace of ideas.

Memorandum Opinion and Order, 39 FCC 2d 377, ¶ 39 (1973).

²⁶ See *Fourth Annual Report* at ¶ 6; see also *Cable Ownership M&O* at ¶ 38 ("As of June 1997, there were more than 64 million cable subscribers representing more than 66% of all television households in the United States.").

²⁷ ABC Comments at 30 (citing *Fourth Annual Report* at ¶ 7).

²⁸ S. Rep. No. 102-92, 102d Cong., 1st Sess., 8, 45, 69 (1991).

²⁹ NCTA Comments at 5; Comments of Time Warner Cable ("Time Warner Comments") at 9.

competition and diversity in the marketplace. As the Commission emphasized in 1980, cases of "[c]ross-ownership between co-located cable systems and television stations are undesirable in that they involve an inherent conflict between the operation of the two entities that would lessen competition in the economic and ideological marketplace that we seek to promote."³⁰ Contrary to NCTA's contention,³¹ in today's marketplace, the public interest rational for the rule – the need to promote diversity in local mass media and to protect against one group having concentrated power in the television marketplace – is stronger than ever.³² As ABC concludes, the same concerns that justified the rule in 1970 "counsel against eliminating the rule at this time."³³

B. PROPONENTS OF REPEAL IGNORE CABLE'S GATEKEEPER ROLE THAT ENABLES CABLE OPERATORS TO DISCRIMINATE AGAINST LOCAL TELEVISION STATIONS

Proponents of repeal, citing increases in the number of media outlets and technological developments since 1970, contend that the cable/television cross-ownership rule serves no public interest purpose.³⁴ But, significantly, these commenting parties ignore the unique relationship between cable and broadcast television that renders the proliferation of outside media outlets irrelevant. Despite alternative media and

³⁰ *In re Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations Relative to Cable Television Systems, and Postponement of Divestiture Requirement of Section 76.501 Relative to Prohibited Cross Ownership in Existence on or before July 1, 1970, Further Notice of Proposed Rulemaking*, Docket No. 20423, 81 F.C.C.2d 150, ¶ 15 (1980).

³¹ NCTA Comments at 3.

³² Although the 1996 Act repealed the statutory restriction on cross-ownership, it intentionally left in place the Commission's restrictions on cable/broadcast cross-ownership in order to protect the public interest. Rep. Markey, who was actively involved in the Conference Agreement, elaborated: "The conference report expressly did not seek to wipe out the broadcast-cable cross-ownership rule and therefore the *Commission is advised not to expend its limited resources reviewing this issue.*" 142 Cong. Rec. H1170 (daily ed. Feb. 1, 1996) (emphasis added).

³³ ABC Comments at 30.

³⁴ Time Warner Comments at 13-18; NCTA Comments at 5-7.

technological advances, repeal of the cable/television cross-ownership rule would pose a significant threat to the viability of independent local broadcasters.

No commenting party denies that cable television systems and broadcast stations compete in local television markets. Congress has recognized this indisputable fact:

Cable television systems and broadcast television stations increasingly compete for television advertising revenues and audience. A cable system has a direct financial interest in promoting those channels on which it sells advertising or owns programming. As a result, there is an economic incentive for cable systems to deny carriage to local broadcast signals, or to reposition broadcast signals to disadvantageous channel positions, or both.³⁵

Further, no commenter denies that cable is a gatekeeper that exercises control over 66 percent, on average, of the homes in the United States.³⁶ In addition to these two undisputed facts, the Commission has found that the local video programming markets are highly concentrated and dominated by the local cable systems, and the Commission and Congress have recognized that vertical relationships can deter entry and competition in the video marketplace.³⁷ Based on all of these marketplace realities, it is clear that, despite the number of media alternatives in the marketplace, cable has both the incentive and the ability to discriminate against local stations. As NAB points out in its comments:

It is clear that there now are significantly more competitive media alternatives than existed in 1970. For this reason NAB has supported here elimination of the daily newspaper/broadcast crossownership restriction and elsewhere has supported liberalization of local duopoly and one-to-a-market rules, for example. However, in none of these regulatory areas are we dealing with one competitor having the potential to eliminate or hamper the public's ability to access to another competitor. But that is the case with cable television.

See NAB Comments at 15.

³⁵ H.R. Rep. No. 628, 102d Cong., 2d Sess. 3 (1992); see also ALTV Comments at 8.

³⁶ See NAB Comments, Appendix A.

³⁷ Congress has concluded that "[t]he cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers." Section 2(a)(5), Cable Television Consumer Protection And Competition Act of 1992, P.L. 102-385, 102d Cong., 2d Sess. (1992). *Fourth Annual Report* at ¶ 157-58 (finding "vertically integrated ownership interests have increased from 1996 . . . In 1997, cable MSOs own 50% or more of 50 networks.").

Commenting parties provide specific evidence of the harms associated with cable's control over the pipeline into the home.³⁸ Univision, for example, outlines first-hand its experience in San Francisco that demonstrates how cable operators abuse their gatekeeper role in an effort to minimize local competition.³⁹ As Univision notes, its experience is not unique and, significantly, these abuses have occurred with the cable/television cross-ownership rule in place.⁴⁰ If the rule were repealed, the incentives for cable operators to abuse their gatekeeper role would increase exponentially. In short, as NAB emphasizes in its comments, cable's gatekeeper role "serves as an overarching reason for the Commission not to alter the broadcast/cable ownership prohibition."⁴¹

C. PROPONENTS OF REPEAL WRONGFULLY DISMISS THE COMPELLING PUBLIC INTERESTS SERVED BY THE CABLE/TELEVISION CROSS-OWNERSHIP RULE

As the majority of commenting parties recognize, the cable/broadcast cross-ownership rule serves a unique role, ensuring that cable, through its gatekeeper role, does not engage in anti-competitive activity. The prohibition is absolutely necessary.⁴² As NASA detailed in its comments, allowing a local cable operator to own a competing television station would give the cable operator unfettered discretion to discriminate in

³⁸ See Time Warner Comments at 6 (claiming that the Commission has to support its rationale with empirical evidence).

³⁹ See Univision Comments at 10.

⁴⁰ See Univision Comments at 12-14. Univision highlights the difficulties it has experienced in enforcing the Commission's existing rules to prevent cable's anti-competitive activities. As the Supreme Court stated in *Turner*:

[t]he record suggests independent broadcasters simply are not in a position to engage in complex antitrust litigation, which involves extensive discovery, significant motions practice, appeals, and the payment of high level fees throughout. . . . An administrative complaint procedure, although less burdensome, would still require stations to incur considerable expense and delay before enforcing their rights.

Turner, 117 S. Ct. at 1202 (citation omitted).

⁴¹ See NAB Comments at 16.

⁴² See NCTA Comments at 11-12 (claiming burden is on those seeking to retain the rule to show that the rule is still necessary).

favor of both its station and the cable programming services it owns or on which it sells advertising. The cable operator could manipulate carriage and channel positioning, publicize its broadcast station on a multiplicity of cable channels, and provide combination advertising rates. These activities easily could weaken any strong broadcast competitors; drive smaller broadcast competitors out of the market completely; and stifle new entry. The result would be the inhibition of competition among local distributors of television programming and competition in the sale of local television advertising to the detriment of subscribers, non-subscribers and advertisers.

The Commission long has recognized that "[p]romoting fair competition between free over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible."⁴³ Repealing the cable/television cross-ownership ban would increase concentration in the local market and, as a result, diminish the program choices available to consumers. As described above, the harms the cable/television cross-ownership rule addresses are real and the rule helps to alleviate these harms in a direct and material way. Retention of the rule, as the majority of commenters emphasizes, is required to maintain a competitive balance in the video marketplace.⁴⁴

⁴³ See *Program Exclusivity in the Cable and Broadcast Industries*, 64 R.R.2d 828, 840 (1988).

⁴⁴ See ABC Comments at 29-30; NAB Comments at 16; ALTV Comments at 39; Univision Comments at 15-16.


IV. CONCLUSION

For the reasons discussed above, and in NASA's initial comments, the national television ownership rule and cable/television cross-ownership rule should be retained in their entirety.

Respectfully submitted,

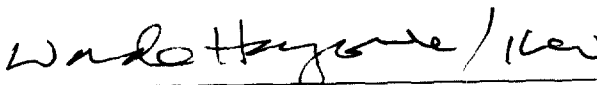
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CERTIFICATE OF SERVICE

I, Kurt A. Wimmer, certify that on this 21st day of August, 1998, a copy of the foregoing Reply Comments of The Network Affiliated Stations Alliance was sent via first-class mail, postage prepaid to the following:

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